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No. 85-

In the Supreme Court of the United States

OCTOBER TERM, 1985

GREATER BATON ROUGE PORT COMMISSION,
Petitioner,

v.

JACINTOPORT CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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6 pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred in holding that the Greater Baton Rouge Port Commission, an Executive Department of the State of Louisiana, did not enjoy, as the alter ego of the State of Louisiana, immunity from suit in federal court under the Eleventh Amendment to the United States Constitution.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in holding that the decision of *Missouri Pacific Railroad v. Travelers Insurance Company*, E.D. La. 1968, 281 F.Supp. 100, in which the Court specifically addressed the status of the Greater Baton Rouge Port Commission as the alter ego of the State of Louisiana, and held that the Commission was the alter ego of the State, rather than an independent agency thereof, was not controlling as to its determination of the very same issue with respect to the Commission's Eleventh Amendment immunity.

PARTIES TO THE PROCEEDING

Petitioner herein is the Greater Baton Rouge Port Commission, an Executive Department of the State of Louisiana. The Greater Baton Rouge Port Commission was the defendant below. Respondent herein, petitioner below, is Jacintoport Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, the Greater Baton Rouge Port Commission, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 10, 1985.

OPINIONS BELOW

The May 4, 1984 opinion of the District Court is reported at 599 F.Supp. 21 (1985), and is reprinted in the Appendix to this Petition, pp. 4a -10a. The June 10, 1985 opinion of the Fifth Circuit Court of Appeals, reversing the District Court and remanding, is reported at 762 F.2d 435 (1985), and is reprinted in the Appendix to this Petition, pp. 11a- 29a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1985. The Greater Baton Rouge Port Commission's petition for rehearing was denied on July 29, 1985 (App. C, infra, p. 30a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eleventh Amendment to the United States Constitution, and the laws of the State of Louisiana relating to the powers and duties of the Greater Baton Rouge Port Commission and to the institution of suits against the state of Louisiana and its agencies and political subdivisions, including particularly Chapter 7 of Title 34 and Chapter 32, Part XV, of Title 13 of the Louisiana Revised Statutes.

STATEMENT OF THE CASE

1. INTRODUCTION

Petitioner herein, the Greater Baton Rouge Port Commission (hereinafter referred to as the "Commission"), is an Ex-

ecutive Department of the State of Louisiana, and is composed of fifteen members appointed by the Governor of Louisiana. The primary responsibility of the Commission is to regulate the commerce and traffic within the four parishes of East Baton Rouge, West Baton Rouge, Iberville and Ascension, in furtherance of the best interests of the State of Louisiana.

In exercising its responsibility to regulate the port commerce and traffic, the Commission is empowered by the State of Louisiana under Chapter 7 of Title 34 of the Louisiana Revised Statutes to administer public wharves, docks, sheds, landings, and other structures, and to provide mechanical facilities therefor, useful for the commerce of the port area. Title to all property and improvements operated by the Commission, whether acquired by purchase or by expropriation, vests in the State of Louisiana.

The respondent herein Jacintoport Corporation (hereinafter referred to as "Jacintoport"), is a Texas corporation and was the owner of a thirty acres tract of batture land located in West Baton Rouge Parish, riparian to the right descending bank of the Mississippi River. Jacintoport Corporation brought this action against the Greater Baton Rouge Port Commission in 1981, alleging that the Commission's construction and maintenance of two mooring buoys in the bed of the Mississippi River, adjacent to Jacintoport's property, impairs Jacintoport's full access to its batture property from the river, and thus, amounts to an unconstitutional expropriation by the Commission of Jacintoport's property. These buoys are used for the mooring of vessels for the loading and unloading at a public wharf operated by the Commission, located immediately down river from Jacintoport's property. Jacintoport seeks declaratory and injunctive relief and, in the alternative, monetary damages.

2. BRIEF PROCEDURAL HISTORY

The case was tried on the merits before the Honorable John V. Parker, Chief Judge for the Middle District of Louisiana, on October 17, 1983, and submitted for decision. On February 10, 1984, the District Court noted, by minute entry, a written stipulation admitted by the parties earlier in the proceeding that the Commission "is an agency, political subdivision or alter ego of the State of Louisiana." The Court requested both parties to brief the issue of whether the action was barred in federal court by the Eleventh Amendment to the United States Constitution. On May 4, 1984, the District Court dismissed the action, finding that the State of Louisiana is the actual party in interest in this action and that the Greater Baton Rouge Port Commission is merely the alter ego of the State of Louisiana and, as such, immune from suit in federal court under the Eleventh Amendment.

In so holding, the District Court recognized that the most important factor in its determination of the Commission's status as the alter ego of the state was the treatment of the Commission in state courts. *Huber, Hunt & Nichols v. Architectural Stone Co.*, 5 Cir. 1980, 625 F.2d 22, 25 ("the factor that subsumes all others"). Accordingly, the Court noted that the Louisiana courts, including the Supreme Court of Louisiana, have repeatedly held that the Commission is an executive department of the state of Louisiana, and not an independent corporation or agency nor a political subdivision. *Miller v. Greater Baton Rouge Port Commission*, 225 La. 1095, 74 So.2d 387 (1954); *Greater Baton Rouge Port Commission v. Morley*, 232 La. 87, 93 So.2d 912 (1957); *Greater Baton Rouge Port Commission v. Watson*, 224 La. 136, 68 So.2d 901 (1953). See App. A, infra, p. 8a.

Moreover, the District Court correctly followed the only decision to ever specifically address the status of the Commis-

sion as the alter ego of the State of Louisiana, *Missouri Pacific Railroad v. Travelers Insurance Company*, E.D. La. 1968, 281 F.Supp. 100. In *Missouri Pacific*, the Court made a thorough examination of the constitutional and statutory provisions which outline the characteristics, powers, responsibilities, and limitations of the Commission and its relationship with the State of Louisiana, as well as the treatment of the Commission by the Louisiana state courts. Based on this examination, the Court held that the Commission is in fact an executive department of the State of Louisiana and thus, the alter ego of the State.

Jacintoport appealed the District Court's dismissal of this action to the United States Fifth Circuit Court of Appeals, and, on June 10, 1985, the Court of Appeals reversed the decision of the District Court, holding that the Commission did not enjoy immunity under the Eleventh Amendment, thereby disaffirming *Missouri Pacific*. The Commission petitioned for a rehearing, which was denied by the Court of Appeals on July 29, 1985.

It is the decision of the United States Fifth Circuit Court of Appeals, that the Greater Baton Rouge Port Commission is not entitled to immunity from suit in federal court by virtue of the Eleventh Amendment to the United States Constitution, which prompts this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case is before this Court for review of the decision of the United States Fifth Circuit Court of Appeals that the Greater Baton Rouge Port Commission, an Executive Department of the State of Louisiana, is not entitled to invoke the immunity from suit in federal court afforded by the Eleventh

Amendment to the United States Constitution. It is the sincere belief of petitioner that the Greater Baton Rouge Port Commission is an arm of the State of Louisiana, a regulatory agency, created for the express and exclusive purpose of furthering the best interest of the state, as opposed to certain local governmental interests. See La. Rev. Stat. 34:1223.C. Thus, the Commission is merely the alter ego of the State of Louisiana. As such, a suit against the Commission is in reality a suit against the state itself, barred in federal court by virtue of the Eleventh Amendment.

The Eleventh Amendment to the United States Constitution denies to federal courts the authority to entertain a suit against a state without its consent. *Ford Motor Company v. Dept. of Treasury*, 65 S.Ct. 347, 323 U.S. 459, 89 L.Ed. 389 (U.S. Indiana 1945). See *Florida Department of Health v. Florida Nursing Home Association*, 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed. 2d 132 (1984) (per curiam) (in the absence of consent, a suit in which a state or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment). Louisiana law is clear that "No suit against the state, state agency, or political subdivision shall be instituted in any court other than a Louisiana state court." La. Rev. Stat. 13:5106.

The primary purpose of the Eleventh Amendment is to assure that the federal courts do not interfere with a state's public policy and its administration of internal public affairs. *Blake v. Kline*, 3 Cir. 1979, 612 F.2d 718, 725, cert. denied, 1980, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed. 2d 1112; *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed. 2d 15 (1963) ("or to restrain the state from acting or compel it to act"); *In re Ayres*, 123 U.S. 443, 505, 8 S.Ct. 164, 31 L.Ed. 216 (1887).

As will be further shown below, the State of Louisiana is the owner of the beds of all navigable waters in the state, the

primary waterway being the Mississippi River. Louisiana Civil Code Article 450. The state owns these beds in the capacity of trustee for the interest of the people of the state. *Gulf Oil Corporation v. State Mineral Board*, 317 So.2d 576 (La. 1975). Additionally, the State of Louisiana holds title to all property operated by the Commission, whether acquired by purchase or expropriation. La. Rev. Stat. 34:1223.C.

As the owner of the Mississippi River bed, the State of Louisiana created the Commission, pursuant to Article VI, Section 29 of the Louisiana Constitution of 1921, to serve as an administrative/regulatory agency of the state, to regulate the commerce and traffic along the Mississippi River within the four-parish port area, "in such manner as may, in its judgment, be for the best interest of the state." La. Rev. Stat. 34:1223.C. Additionally, the State of Louisiana statutorily granted the Commission the power to construct and maintain "in beds of natural navigable water bodies, and on their banks and shores, works necessary for public utility, including buildings, wharves and other facilities for the mooring of vessels and the loading or discharging of cargo and passengers." Louisiana Civil Code Article 460. Thus, the Greater Baton Rouge Port Commission, an Executive Department of the State of Louisiana, serves merely as an administrative agent of the state, statutorily restricted to further only the best interests of the state, in the administration of the State of Louisiana's public affairs. The inescapable conclusion, therefore, is that federal court interference with the Commission's activities, conducted pursuant to its enumerated constitutional and statutory powers, is, in reality, interference with the State of Louisiana's public policy and its administration of internal public affairs, contrary to the purpose of the Eleventh Amendment.

It is well established that a suit against a state agency which is not a separate and independent entity, but rather is

the alter ego of the state, is the same as a suit against the state itself, and is, consequently, barred in federal court under the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974); *Ford Motor Company v. Department of Treasury*, supra; *Department of Health & Rehabilitative Services v. Davis*, 5 Cir. 1980, 616 F.2d 828. In order to determine whether the suit is in reality a suit against the state itself, the court must examine the particular entity in question and its powers and characteristics as created by state law. *Mount Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed. 2d 471 (1977); *Laje v. R.E. Thomason General Hospital*, 5 Cir. 1982, 665 F.2d 724.

While the characteristics, powers and limitations of the Greater Baton Rouge Port Commission will be discussed in greater detail below, it should be noted at the outset that the Commission's characteristics, powers and limitations were examined in a case prior to the instant one. *Missouri Pacific Railroad v. Travelers Insurance Company*, supra. The *Missouri Pacific* case specifically addressed the issue of whether the Greater Baton Rouge Port Commission was an independent entity, subject to suit in federal court, or the alter ego of the State of Louisiana. The Court held the Commission to be the alter ego of the State of Louisiana. Although the characteristics and powers of the Commission are the same today as they were when *Missouri Pacific* was decided, and although the *Missouri Pacific* court carefully examined the Commission's characteristics and powers, the same as it would today, the Fifth Circuit Court of Appeals disaffirmed the *Missouri Pacific* decision. It is respectfully urged that the Court of Appeals' disapproval of *Missouri Pacific*, and the substitution of its own interpretation of the Commission's powers and characteristics was an act beyond its scope of review and was, consequently, in error.

I. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT THE GREATER BATON ROUGE PORT COMMISSION DID NOT ENJOY IMMUNITY FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. BECAUSE THE GREATER BATON ROUGE PORT COMMISSION, AN EXECUTIVE DEPARTMENT OF THE STATE OF LOUISIANA, IS THE ALTER EGO OF THE STATE OF LOUISIANA, RATHER THAN A SEPARATE AND INDEPENDENT AGENCY THEREOF, THE STATE OF LOUISIANA IS THE REAL PARTY IN INTEREST TO THIS SUIT.

The Eleventh Amendment to the United States Constitution prohibits federal courts from entertaining suits for damages when a state is the real party in interest. *Edelman v. Jordan*, supra; *Ford Motor Co. v. Department of Treasury*, supra. It is not necessary that the state be named as a party, but only that the named party is, in reality, the *alter ego* of the state. *Blake v. Kline*, supra. [Emphasis added]

The named party in the instant case is the Greater Baton Rouge Port Commission, an Executive Department of the State of Louisiana. The Commission was created by Amendment to Article VI, Section 29, of the Louisiana Constitution of 1921, and implemented under Chapter 7 of Title 34 of the Louisiana Revised Statutes (La. Rev. Stat. 34:1221 et seq.). The Commission is composed of fifteen members who serve at the pleasure of the Governor of Louisiana. The commissioners are appointed by the Governor from a panel of names submitted by the legislative delegations of the four parishes which comprise

the port area, East Baton Rouge, West Baton Rouge, Iberville and Ascension. Each appointment by the Governor is submitted to the Senate for confirmation. Louisiana Revised Statute 34:1223.C. provides the rights and powers of the Commission as follows:

> "C. The commission shall *regulate the commerce and traffic* within such port area in such manner as may, in its judgment, be *for the best interest of the state*. It shall have charge of, and administer public wharves, docks, sheds and landings and shall be empowered to construct or acquire and equip wharves and landings and other structures useful for the commerce of the port area and to provide mechanical facilities therefor; to erect sheds or other structures on such wharves and landings; to maintain proper depths of water at all such wharves and landings; to provide light, water, police protection and other services for its facilities as it may deem advisable; to construct or acquire, maintain and operate basins, locks, canals, warehouses and elevators; to charge for the use of all facilities administered by it and for all services rendered by it, such fees, rates, tariffs or other charges as it may establish; to establish harbor lines within the port area by agreement with the corps of engineers; and to construct, own, operate and maintain terminal rail facilities and other common carrier rail facilities for the purpose of rendering rail transportation to and from the facilities to be erected, owned and operated by the commission in both intrastate and interstate commerce. Title to all property and improvements thereon operated by the commission shall vest in the State of Louisiana." [Emphasis added]

When the status of a state agency is questioned as either the alter ego of the state or an independent entity, the court must analyze the particular entity in question and its powers

and characteristics as created by state law, as well as its relationship to the state. *Mount Healthy City School Dist. Bd. of Education v. Doyle*, supra; *Laje v. R.E. Thomason General Hospital*, supra.

The factors to be considered were enumerated in *Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., Inc.*, supra, as follows:

(1) the agency's "right to hold and use property";
(2) whether the agency has the "*express* authority to sue and be sued, plead and be impleaded, in its corporate name;
(3) the extent of the agency's independent management authority; and,
(4) the "*factor that subsumes all others*, the treatment of the [agency] by the Louisiana Courts." (625 F.2d at 25) [Emphasis added]

These factors were again adopted by the Fifth Circuit Court of Appeals in *Tradigrain, Inc. v. Mississippi State Port Authority*, 5 Cir. 1983, 701 F.2d 1131, with the addition of three more considerations:

(5) whether the state is responsible for the agency's debt;
(6) whether the agency is primarily concerned with local, as opposed to statewide, problems; and
(7) the degree of general financial authority of the agency. (701 F.2d at 1132).

See also *Laje v. R.E. Thomason General Hospital*, supra; *C.H. Leavell & Co. v. Bd. of Commissioners of Port of New Orleans*, 5 Cir. 1970, 424 F.2d 764; *Centraal Stikstof Verkoopkantoor, N. V. v. Alabama State Docks Department*, 5 Cir. 1969, 415 F.2d 452; *Kurkiewicz v. State of Louisiana, through Department of Health*, 560 F.Supp. 911 (M.D. La. 1983).

While the analysis of the first factor, the agency's right to hold and use property, is straight-forward, it should also probably be the most important consideration of this case. Louisiana Revised Statute 34:1223.C. provides "Title to all property and improvements thereon, operated by the Commission vests in the *State of Louisiana.*"[1]

As mentioned above in the Introduction, the State of Louisiana owns the bed of the Mississippi River, the use of which is the subject matter of the case on the merits. La. Civ. Code art. 450. *Gulf Oil Corporation v. State Mineral Board*, 317 So.2d 576 (La. 1975); *Miami Corporation v. State*, 186 La. 784, 173 So. 315 (La. 1937), cert. denied, 302 U.S. 700, 58 S.Ct. 19, 82 L.Ed. 541 (rights of sovereign state to ownership of beds of navigable waters must be read into titles of those who own lands bordering of such waters). In addition, under Louisiana Revised Statute 34:1223.C., the State of Louisiana holds title to the two buoys constructed into the bed of the Mississippi River which Jacintoport now claims impair its river access to the batture property.

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1. To the contrary, the Port of New Orleans holds title to all of the property and improvements it operates. *C.H. Leavell*, 424 F.2d at 765. It should be noted that while the Fifth Circuit was of the opinion that this difference was not sufficient to distinguish the Greater Baton Rouge Port Commission from the Port of New Orleans (see App. B, infra, p. 28a), this factor was of primary importance to the Court in *C.H. Leavell* in distinguishing the Port of New Orleans from the Alabama State Docks Department. In *Leavell*, the Court stated:

> "This case is readily distinguishable from *Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Department*, supra. There we made a determination of status under Alabama law where a clear State precedent was available. As this court pointed out regarding the act creating the Alabama State Dock Department: "The statute allows the Docks Department to develop harbor facilities *in the name of the*

Thus, the Commission has no ownership interests whatsoever in the subject matter involved in the case on the merits. Instead, the Commission is only interested in the *use* of the Mississippi River bed and the buoys as the means for regulating the commerce and traffic on the Mississippi River, in furtherance of the best interest of the state. La. Rev. Stat. 34:1223.C. This factor clearly weighs in favor of a finding that, as the owner of all the property operated by the Commission, the State of Louisiana is the real party in interest in this suit.

Irrespective of whom the named defendant is, an action in which a judgment for the petitioner would "affect or control the property or actions of the state" is an action against the state. *Miree v. United States*, 490 F.Supp. 768 (D.C. Ga. 1980). A judgment in favor of Jacintoport in this case that the construction of the buoys into the Mississippi River bed constitutes an unconstitutional expropriation of Jacintoport's property, would certainly "affect or control the property" of the State of Louisiana (both the buoys and the Mississippi River bed).

Not only would such a judgment affect the State's ownership interest in the particular portion of the Mississippi

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State, title to all property vests in the *State of Alabama;* suit is to be brought *in the name of the state.*" (Italics in original) 415 F.2d at 457. None of these factors emphasized in the Alabama case are present here." (424 F.2d at 765.)

Accordingly, the Fifth Circuit determined that, unlike the Alabama State Docks Department, which was held to be the alter ego of the State of Alabama solely because it possessed the above three characteristics, the Port of New Orleans was held to be an entity sufficiently separate from the state to sustain diversity jurisdiction.

Because the above three characteristics of the Alabama State Docks Department are also found in the Greater Baton Rouge Port Commission, it is reasonable to conclude that the Commission should likewise be considered as the alter ego of the State of Louisiana.

River bed where the Commission's buoys are located, but it would effectively serve as an adjudication of the State's ownership interest in the beds of all navigable waters in Louisiana. Such a result would surely interfere with the state's "public policy and administration of internal public affairs," contrary to the purpose of the Eleventh Amendment. *Blake v. Kline*, supra.

The second factor to be considered in assessing a state agency's status as an independent entity or the alter ego of the state is whether the agency is *expressly* authorized to sue and be sued in its corporate name. [Emphasis added]. See *Tradigrain*, 701 F.2d 1131, at 1132. The Court of Appeals found this factor to weigh against immunity, stating that "although the Louisiana legislature did not *expressly* authorize the Commission to sue and be sued in its own name," because it had previously appeared in two state court cases and in two federal court cases it would be construed to have authority to sue and be sued. [Emphasis added]. See App. B, infra, p. 26a. However, in one of the federal court cases[2], the action was dismissed in its entirety, and, in the second[3], the Commission did in fact raise the question of sovereign immunity, but was absolved of any liability apparently before the court could address the immunity issue.

In any event, the inquiry is whether the agency in question has the *express* authority to sue and be sued, not whether the agency has ever been a party to a lawsuit before. Thus, contrary to the finding of the Court of Appeals, because the

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2. *Louisiana & Arkansas Ry. v. Missouri Pacific Railroad*, E.D. La. 1968, 288 F.Supp. 320, aff'd 5 Cir. 1969, 415 F.2d 751, cert. denied, 1970, 396 U.S. 1050, 90 S.Ct. 757, 24 L.Ed. 2d 754.

3. *Ohio River Co. v. M/V Irene Chotin*, E.D. La. 1965, 238 F.Supp. 114.

Commission does not have the *express* authority to sue and be sued in its corporate name, this factor also weighs in favor of immunity.

A further indicia of the Commission's status as the alter ego of the State of Louisiana, as it relates to the absence of express authority to the Commission to sue and be sued, is the right granted to the Commission to utilize the services of the Louisiana Attorney General's Office. La. Rev. Stat. 34:1223.B. Such a right would certainly be unusual if the Commission were deemed an independent entity rather than the alter ego of the State of Louisiana.

Finally, even assuming this Court determines that the Commission somehow obtained the authority to sue and be sued, it is apparent that this factor is no longer entitled to much weight, at least by the Fifth Circuit Court of Appeals. In *Tradigrain*, supra, the Fifth Circuit found the Port Authority to be the alter ego of the State of Mississippi, despite the fact that it had the *express* statutory authority to sue and be sued in its own name.

The third factor, the extent of the agency's independent management authority, contrary to the position of the Court of Appeals, also weighs in favor of immunity. As recognized by the Court of Appeals, the agency's local autonomy is not only a measure of the closeness of the relationship between the agency in question and the state, it also serves as the mechanism through which the Eleventh Amendment "assures that the federal courts do not interfere with a state's public policy and its administration of internal public affairs." *Blake*, 612 F.2d at 725. See App. B, infra, p. 24a. While the Court of Appeals acknowledged that the Commission members serve at the pleasure of the Governor of Louisiana, and recognized that this vulnerability of the commissioners weighs against a find-

ing of local autonomy (citing *Gibson-Homans Co. v. New Jersey Transit Corp.*, D.N.J. 1982, 560 F.Supp. 110, 113, in which a corporation was found to lack autonomy from the state where the Governor appointed the members of the governing board), the Court stated that "the determination of an agency's autonomy requires analysis of the 'extent of the [entity's] independent management authority', *Huber*, 625 F.2d at 25, not just the independence of the individual commissioners." App. B, infra, p. 24a-25a.

What the distinction is between the Commission's independence as an entity and the independence of the fifteen individual commissioners was not explained by the Court of Appeals. Moreover, it is doubtful that a distinction does exist, especially where there are no statutory guidelines for the removal of the commissioners by the Governor, other than Louisiana Revised Statute 34:1223.B., which indicates membership can cease "for any reason." It is entirely possible that the Governor could remove and replace all fifteen commissioners in response to an action taken by the Commission as a whole which displeases him.

Also, while the Commission is authorized to enter into contracts and negotiate sales, as noted by the Court of Appeals, it should also be noted that the Commission must comply with the provisions of the Louisiana Public Bid Law (La. Rev. Stat. 38:2211 et seq.), a factor mentioned in *Tradigrain* as indicative of an agency status.

Furthermore, Louisiana Revised Statute 34:1223.C. clearly requires that the actions of the Commission be for the best interests of the State of Louisiana, and not for peculiar local interests. The closeness of the relationship between the Commission and the State of Louisiana is further illustrated when the above requirement is coupled with the fact that the bed of the Mississippi River and all of the property and improvements thereon operated by the Commission are owned

by the State of Louisiana. As discussed in the Introduction above, the Commission uses the property of the State of Louisiana, not in furtherance of certain local governmental interests, but as an agent of the State, charged with the administration of such State property as needed for the regulation of the commerce and traffic within the port area. As an agent of the State of Louisiana, the Commission cannot act autonomous of the State of Louisiana. It is the alter ego of the State.

The fourth factor, the one that "subsumes all others," is the treatment of the agency by state courts. *Huber*, 625 F.2d at 25. See App. B, infra, p. 18a; *Tradigrain*, supra (essential question is whether the state is the real party in interest, and resolution of this question is a matter of state law). The Louisiana courts have repeatedly recognized that the Greater Baton Rouge Port Commission is the alter ego of the State of Louisiana. In *Miller v. Greater Baton Rouge Port Commission*, supra, the Supreme Court of Louisiana expressly found that "the Port Commission is not a corporation but an Executive Department of the State." 74 So.2d at 390. The Supreme Court went further to describe the term notes and bonds issued by the Commission as "the primary obligations of the State." 74 So.2d at 389. More significantly, the Supreme Court expressly found that the *Commission* is *not a political subdivision* of the state. 74 So.2d at 398. Even the Fifth Circuit Court of Appeals recognized that "independent local political subdivisions are not entitled to [Eleventh Amendment] immunity even though they exercise a 'slice of state power'." See App. B, infra, p. 16a. Finally, the Louisiana Supreme Court concluded that "[plaintiffs] contentions and arguments advanced in support of it are based on the assumption that the [Greater Baton Rouge] Port Commission is an *entity separate from the State. This is not true.* The Port Commission is an Executive Department of the State..." 74 So.2d at 391. [Emphasis added].

To the same effect are the state court decisions of *Greater Baton Rouge Port Commission v. Morley*, supra, and *Greater Baton Rouge Port Commission v. Cargill*, 252 La. 718, 214 So.2d 119 (La. 1968), in which the Commission was recognized as a state agency and as an executive department of the state of Louisiana. While these state court decisions obviously were not concerned with the Commission's status as an alter ego of the State of Louisiana for the purpose of considering Eleventh Amendment immunity or diversity jurisdiction, they clearly do reflect that the Louisiana state courts treat the Commission as the alter ego of the State of Louisiana, and not as an entity separate and independent from the State of Louisiana. There are no cases, state or federal which even suggest that the Greater Baton Rouge Port Commission is considered a separate and independent entity, distinguished from the State of Louisiana. The Fifth Circuit Court of Appeals apparently felt it was not bound by the Louisiana decisions of *Miller*, supra, etc. because the status of the Port Commission was not considered in the context of Eleventh Amendment immunity or federal diversity jurisdiction. Why would a *state* court be concerned with federal court immunity or diversity jurisdiction?

The fifth factor to be considered under *Tradigrain*, is whether the state is responsible for the agency's debt. In *Tradigrain*, supra, the Fifth Circuit found that the state's status as the primary guarantor of the Port Authority's bonds was an indicium that the Port was the alter ego of the State of Mississippi. Similarly, in *Miller*, supra, the Supreme Court of Louisiana found that the term notes and bonds issued by the Greater Baton Rouge Port Commission are "the primary obligations of the State [of Louisiana]." 74 So.2d at 389. See La. Rev. Stat. 34:1224.

The sixth factor, somewhat related to the third factor discussed above, is whether the agency is primarily concerned

with local, as opposed to state-wide, problems. To reiterate, the statutory mandate is that the Commission is to "regulate the commerce and traffic within such port area in such manner as may, in its judgment, be for the best interest of the state." La. Rev. Stat. 34:1223.C. While the Fifth Circuit Court of Appeals found this statutory provision to be "ambiguous" (See App. B, infra, p. 27a), the language restricting the Commission's actions to "within the port area" is intended simply as a geographical limitation, and, contrary to the meaning attached by the Fifth Circuit, should not be interpreted to require the Commission to act in furtherance of the interests peculiar to those within the four-parish port area, as opposed to the interests of the state at large.

The only logical interpretation of Louisiana Revised Statute 34:1223. C. is that the Commission is to act for the benefit of the State of Louisiana as a whole, within a restricted geographical location. Thus, contrary to the position of the Fifth Circuit (See App. B, infra, p. 27a), under the quoted McQuillan standards and the "governmental" or "proprietary" test, the Commission acts for the "good of the state at large" ("best interest of the state"), rather than for the "peculiar and special advantage of the inhabitants" within the port area. See App. B, infra, p. 27a. Consequently, the Commission acts in a governmental capacity, not a proprietary capacity. *Morrison-Knudsen Co. v. Massachusetts Bay Transp.*, D. Idaho 1983, 573 F.Supp. 698, 703; 1 McQuillan, Municipal Corporations §1.09 (1971).

A final indication of the governmental capacity of the Commission is realized through a comparison of the Greater Baton Rouge Port Commission with the Port of New Orleans. While the commissioners of the Greater Baton Rouge Port Commission are selected from a panel of names submitted by the legislative delegations of the four parishes within the port area, the Port of New Orleans commissioners are selected from

names submitted by the various industrial and business concerns in the New Orleans area.[4] This factor therefore also weighs in favor of immunity.

The final factor, the degree of the agency's financial authority, is difficult to assess. The relief sought on the merits by Jacintoport is declaratory and injunctive relief and damages, or, in the alternative, monetary damages alone. The amount of monetary damages claimed by Jacintoport is $405,000 ($1,000 per foot x 400 feet, plus $5,000 expert fees), together with all costs of these proceedings.

One of the most important goals of the Eleventh Amendment is to shield state treasuries. *Edelman v. Jordan*, supra. The test of the Supreme Court is "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *Ford Motor Company v. Department of Treasury*, 323 U.S. at 464.

In finding that the Commission was financially independent from the State of Louisiana, the Fifth Circuit Court of Appeals reasoned:

> "[The trial court] record shows that even the most favorable estimation of Jacintoport's monetary damages does not reach a tenth of the Commission's surplus revenue in a 'good year' - of which it has had several recently. The State of Louisiana will not incur liability on this judgment's account." (App. B, infra, p. 22a).

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4. New Orleans Board of Trade, Ltd., New Orleans Steamship Association, Chamber of Commerce, International Freight Forwarders & Customs Brokers Association of New Orleans, Inc., International House, Maritime Trade Council of Greater New Orleans & Vincinity, etc. See La. Rev. Stat. 34:1221.A.; La. Rev. Stat. 34:1.B.

It is respectfully submitted that this statement is not correct. In order for a $405,000 damages claim to be less than "a tenth of the Commission surplus revenue," the surplus revenue of the Commission would have to be in excess of $4,050,000. There is no indication whatsoever in the trial court record that the Commission's surplus revenue has ever reached such an enormous amount.

To the contrary, it appears that the only evidence in the record of the Commission's surplus revenue is an off-the-cuff statement by the former Executive Director, Mr. C.W. Herbert, that the Commission's surplus revenue in a good year could be "A million, a million and a half." Deposition of C.W. Herbert, p. 25. The weight to be assigned to this statement is questionable in two respects.

First, the variance in Mr. Herbert's estimation, half a million dollars, is simply too substantial of an amount to constitute an accurate estimate. That is, while the implication of Mr. Herbert's estimation is that half a million dollars is not a substantial amount to the Commission, it should be realized that this variance would be sufficient to fully satisfy Jacintoport's damage claim.

Second, Mr. Herbert's deposition was taken in February, 1982, more than three years ago. While the surplus revenue of the Commission may have been in the million to million and a half range during the period of time between 1979 and 1982, it is submitted that due to the economic slump in Louisiana industries over the past few years, the Commission's surplus revenue has steadily and substantially decreased since 1982, to a current level of approximately $500,000.

A $405,000 judgment in favor of Jacintoport would amount to 81% of the Commission's current surplus revenue, not 10%, as indicated by the Court of Appeals. In any event, assuming

the Commission could itself satisfy Jacintoport's damage claim, without having to look directly to the state for the actual payment, it is submitted that, in considering the effect of this suit on the state treasury, the Court should look beyond the immediate impact of such a substantial monetary judgment if it is to fully realize who will actually satisfy a judgment.

Mr. Herbert's deposition established that the Commission's surplus revenue is regularly used for its capital improvements. Deposition, Mr. C.W. Herbert, pp. 24-26. Satisfaction of a $405,000 out of the $500,000 surplus revenue fund would leave the Commission with virtually no funds for its necessary capital improvements. The Commission would then have to look to the state to replace the $405,000 taken out of its surplus revenue fund. In other words, the Commission would use one hand to pay $405,000 to Jacintoport, and, at the same time, would hold the other hand out to the state for $405,000 in capital improvement funds.

The ultimate effect, therefore, is that a $405,000 judgment in favor of Jacintoport would be satisfied out of the state treasury. Consideration of less than the full picture is to exact form over substance. Because a monetary judgment in favor of Jacintoport would ultimately be satisfied by the state treasury, rather than by the Commission, the State of Louisiana is the real, substantial party in interest and is entitled to invoke its sovereign immunity. *Ford Motor Company*, supra.

It is respectfully urged that another error committed by the Fifth Circuit Court of Appeals was the Court's express refusal to address the Commission's immunity in a situation "where the size and nature of the judgment" would clearly result in state liability. See App. B, infra, p. 22a. This statement implies that the Commission would be subject to federal court suits in good years, but immune from such suits in bad years. Such a case-by-case approach would be injudicious.

In conclusion, the analysis and weighing of the various factors enumerated in *Huber* and *Tradigrain* for assessing a state agency's status as the alter ego of the state or an independent entity, clearly show that the Greater Baton Rouge Port Commission is the alter ego of the State of Louisiana, entitled to immunity from suit in federal court under the Eleventh Amendment to the United States Constitution.

II. THE FIFTH CIRCUIT ERRED IN DISAPPROVING THE DECISION OF *MISSOURI PACIFIC RAILROAD V. TRAVELERS INSURANCE COMPANY*

In *Missouri Pacific Railroad v. Travelers Insurance Company*, E.D.La. 1968, 281 F.Supp. 100, the Court specifically addressed the question of whether the Greater Baton Rouge Port Commission is the alter ego of the State of Louisiana, rather than an independent agency thereof. After a thorough analysis of the powers, responsibilities, attributes and limitations of the Commission, the relationship between the Commission and the State of Louisiana, and "the 'essential nature and effect of the proceedings'," the Court held that the Greater Baton Rouge Port Commission is the alter ego of the State of Louisiana, and not an independent agency thereof. 281 F.Supp. at 102 [quoting *Pennsylvania Turnpike Comm. v. Welsh*, 188 F.2d 447 (3rd Cir. 1951)].

Although the *Missouri Pacific* holding, that the Commission is the alter ego of the State of Louisiana, involved a determination of the Commission's citizenship for diversity jurisdiction rather than the Commission's immunity under the Eleventh Amendment, there can be no doubt that the analysis of the agency's status is the same in both situations. As discussed in *Ramada Inns, Inc. v. Rosemount Memorial Park*

Ass'n, 3 Cir. 1979, 598 F.2d 1303, 1309, the only distinction between the two situations is that a state can waive its Eleventh Amendment immunity, but can not waive the lack of subject matter jurisdiction if diversity is not present. See App. B, infra, p. 15a.

It is noteworthy that in disapproving *Missouri Pacific*, the Fifth Circuit's statement, App. B, infra, p. 17a, that the Port of New Orleans was held to be an independent entity "not entitled to immunity" in *C.H. Leavell*, supra, is not correct. The issue in *Leavell* was diversity jurisdiction, not Eleventh Amendment immunity. However, if the implication of that statement is that the Port of New Orleans is to be treated the same for the purpose of diversity jurisdiction as for Eleventh Amendment immunity, the Greater Baton Rouge Port Commission should likewise be treated the same for the purpose of immunity under the Eleventh Amendment as it has already been treated for the purpose of diversity jurisdiction, i.e., as the alter ego of the State of Louisiana.

Despite the extensive analysis and sound reasoning in the *Missouri Pacific* decision, the Fifth Circuit Court of Appeals nevertheless found it not to be controlling, stating two reasons. See App. B, infra, p. 21a. First, the Fifth Circuit noted that the author of *Missouri Pacific*, Judge West, did not "consider that holding to bar a later suit against the Commission by a railroad company seeking injunctive relief."[5] See App. B, infra, p. 21a. This fact is meaningless for two reasons.

The status of the Commission as the alter ego of the State of Louisiana could have been a cause for concern to the *Louisi-*

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5. *Louisiana & Arkansas Railway v. Missouri Pacific Railroad*, E.D.La. 1968, 288 F.Supp. 320, aff'd 5 Cir. 1969, 415 F.2d 751, cert. denied, 1970, 396 U.S. 1060, 90 S.Ct. 757, 24 L.Ed. 2d 754.

ana & Arkansas Railway court for only one of two reasons, either the asserted basis of jurisdiction was diversity of citizenship, or the issue of sovereign immunity was raised. Examination of the *Louisiana & Arkansas Railway* decision reveals however that diversity of citizenship was not the basis for jurisdiction; thus, the court was not concerned with the Commission's status as the alter ego of the State of Louisiana nor its lack of citizenship.

Second, while the Commission *could* have raised its sovereign immunity, as the alter ego of the State of Louisiana, it is also just as possible that the Commission simply chose to waive its immunity defense for that one particular case.[6] The *Louisiana and Arkansas Railway* decision does not reflect whether the issue of the Commission's immunity was raised or not. In the absence of an indication that the issue of sovereign immunity was considered, the mere fact that a suit was maintained against the Commission, subsequent to the *Missouri Pacific* decision, is of no effect.

The second reason provided by the Fifth Circuit for finding *Missouri Pacific* did not control the instant case was that *its* analysis of the Commission under the test for Eleventh Amendment immunity enunciated in *Laje*, supra, and *Tradigrain*, supra, convinced it that the Commission should not enjoy governmental immunity. See App. B, infra, p. 17a. However, a close review of the *Missouri Pacific* decision shows that, just as required in *Laje* and *Tradigrain*, the Court thoroughly analyzed all of the powers and characteristics of the Commission, the relationship of the Commission to the State of Louisiana, as well as the nature of the suit and the effect of the suit on the state. See *Missouri Pacific*, 281 F.Supp., at 102 - 103.

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6. A state may waive its Eleventh Amendment immunity. *Ramada Inns, Inc. v. Rosemount Memorial Park Ass'n.*, supra.

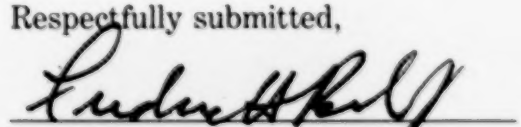
Because the *Missouri Pacific* court considered the same factors as required in *Laje* and *Tradigrain*, and because the powers and characteristics of the Commission and the relationship between the Commission and the State have remained unchanged since the *Missouri Pacific* case was decided, no valid reason exists for finding the *Missouri Pacific* holding does not control the Commission's Eleventh Amendment immunity, as the alter ego of the State of Louisiana. The Fifth Circuit Court of Appeals erred in substituting its own analysis of the Commission's powers and characteristics, thereby disaffirming *Missouri Pacific Railroad v. Travelers Insurance Company.*

CONCLUSION

The status of the Greater Baton Rouge Port Commission as the alter ego of the State of Louisiana has been established for over seventeen years. In the meantime the powers and characteristics of the Commission and its relationship with the State has remained unchanged. Nevertheless, the Fifth Circuit Court of Appeals has, in this case, taken it upon itself to change the status of the Commission to that of an independent entity, subject to suit in federal court, simply by substituting its own analysis of the Commission's powers and relationship with the State of Louisiana in place of the analysis made over seventeen years ago.

Further, the peculiar facts of this case, that the State of Louisiana owns the property the use of which is complained of, and that a judgment in favor of Jacintoport would adjudicate the State's ownership interests in the beds of navigable waters, interfere with the State's administration of its property, and would ultimately be satisfied out of the state treasury, all require a determination that the State of Louisiana is the real party in interest in this action. This Court should therefore grant the petition for writ of certiorari.

Respectfully submitted,



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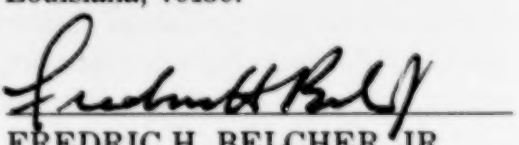
October 1985

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari was mailed, postage prepaid, by United States Mail, to counsels for respondent, Charles D. Marshall, Jr. and Andrew Podolnick, Attorneys at Law, 1100 Whitney Building, New Orleans, Louisiana, 70130.



FREDRIC H. BELCHER, JR.

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APPENDIX A

JACINTOPORT CORPORATION
v.
GREATER BATON ROUGE PORT COMMISSION.

Civ. A. No. 81-271-A.

United States District Court,
M.D. Louisiana.

May 4, 1984.

Corporate landowner brought action against port commission alleging that access to corporate property had been impaired, and seeking injunctive relief or money damages. After trial on merits, the District Court, John V. Parker, Chief Judge, held that: (1) action was barred by Eleventh Amendment, since port commission was alter ego of state, and (2) corporation was not entitled to join president of port commission as defendant in order to avoid Eleventh Amendment bar.

Order accordingly.

1. Federal Courts ⇐ 265,274

Eleventh Amendment to Constitution prohibits suits in federal courts against state by citizens of another state and even by citizens of that state. U.S.C.A. Const. Amend. 11.

2. Federal Courts ⇐ 266

Eleventh Amendment immunity may be waived by state, or abrogated by Congress, but only state itself, not its attorneys, may waive immunity. U.S.C.A. Const. Amend. 11.

3. Federal Courts ⇐ 265

Eleventh Amendment immunity may be raised at any stage of proceedings, even for first time on appeal. U.S.C.A. Const. Amend. 11.

4. Stipulations ⇐ 12

Corporation that brought action against port commission would be allowed to withdraw from written stipulation that commission was agency, political subdivision, or alter ego of state.

5. Stipulations ⇐ 13

There is no justice in binding party to inadvertent stipulation which may be in error.

6. Federal Courts ⇐ 269

Where suit is brought against agency of state, it becomes necessary to determine whether state is real party in interest for Eleventh Amendment purposes. U.S.C.A. Const. Amend. 11.

7. Federal Courts ⇐ 269

In determining whether, for Eleventh Amendment purposes, state is real party in interest in suit brought against state agency, court must examine particular entity in question and its powers and characteristics as created by state law, and court must look first to state's constitutional, statutory and decisional law. U.S.C.A. Const. Amend. 11.

8. Federal Courts ⇐ 269

Action by corporate landowner against port commission alleging that commission had impaired access to corporation's property from river was barred in federal court under Eleventh Amendment, since, under Louisiana law, port commission was alter ego of state, which would be deemed to be real party in interest. U.S.C.A. Const. Amend. 11; LSA-Const. Art. 14, § 19; LSA-Const. 1921, Art. 6, § 29; Fed. Rules Civ. Proc. Rule 12(h)(3), 28 U.S.C.A.

9. Federal Courts ⇐ 269

Corporate landowner, whose action for damages or injunctive relief against port commission for blocking access to corporate property was barred in federal court under Eleventh Amendment on grounds that port commission was alter ego of

state, was not entitled to join president of port commission in order to remove Eleventh Amendment bar as regards injunctive relief, since conduct complained of was state action undertaken by commission as whole, not simply by one of its members, and since president could not be deemed to have taken action outside scope of his statutory authority as state official. U.S.C.A. Const. Amend. 11.

Charles D. Marshall, New Orleans, La. for plaintiff.
Fred H. Belcher, Jr., Baton Rouge, La., for defendant.

JOHN V. PARKER, Chief Judge.

This action was brought by plaintiff against the defendant alleging that the defendant had constructed two buoys in the bed of the Mississippi River adjacent to plaintiff's batture and levee property which impair access to plaintiff's property from the river. The buoys are used in connection with the mooring of vessels for loading and unloading purposes at the public wharf operated by the commission and leased to Apex Petroleum Fuel and Terminal Oil Company, located immediately down river from plaintiff's property. Plaintiff prayed for injunctive relief and alternatively for money damages. The case has been tried on the merits and submitted for decision.

After the trial the court noted a written stipulation that "the commission is an agency, political subdivision or alter ego of the state of Louisiana" and on February 10, 1984 requested that counsel for both sides brief the issue of whether this action is barred by the Eleventh Amendment.

[1-3] The Eleventh Amendment to the Constitution prohibits suits in federal courts against a state by citizens of another state and even by citizens of that state. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Hans V. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 349 (1890). Eleventh Amendment immunity may be waived by the

state, *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), or abrogated by the Congress, *Edelman v. Jordan*, *supra*, but only the state itself, not its attorneys, may waive immunity and immunity may be raised at any stage of the proceedings, even for the first time on appeal. *Edelman v. Jordan*, 415 U.S. at 677, 94 S.Ct. at 1363. Since the immunity defense "sufficiently partakes of the nature of a jurisdictional bar," *Edelman v. Jordan*, 415 U.S. at 678, 94 S.Ct. at 1363, the court *sua sponte* raised the issue upon discovery of the stipulation, despite the fact that the case has been tried on the merits. Both sides have briefed the issue of the status of the Port Commission. The Port Commission has never formally pleaded Eleventh Amendment immunity but it now takes the position in brief that it is the alter ego of the state, that the state of Louisiana is the real party in interest, and that this action is barred. Plaintiff now moves: (1) to withdraw from the stipulation, (2) to amend the pleadings to conform with the evidence and, (3) to add an individual defendant, Mr. Randall Cashio, the President of the Greater Baton Rouge Port Commission.

[4, 5] The first two motions are hereby granted. There is no justice in binding a party to an inadvertent stipulation which may be in error. *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983). That ruling does not, however, resolve the matter.

[6, 7] Where a suit is brought against an agency of a state, it becomes necessary to determine whether the state is the real party at interest, *Department of Health & Rehabilitative Services v. Davis*, 616 F.2d 828 (5th Cir. 1980) and the court "must examine the particular entity in question and its powers and characteristics as created by state law." *Laje v. R.E. Thomason General Hospital*, 665 F.2d 724, 727 (5th Cir. 1982). In making this determination the court must look first to the state's constitutional, statutory and decisional law. *Tradigrain, Inc. v. Mississippi State Port Authority*, 701 F.2d 1131 (5th Cir. 1983).

[8] The Greater Baton Rouge Port Commission was created by Section 29 of Article 6 of the Louisiana Constitution of 1921 (continued as a statute by the provisions of Section 19 of Article 14 of the Louisiana Constitution of 1974). It is granted significant authority, including the power to regulate commerce and traffic within the port area, the power to construct, lease and administer the public wharfs and docks, the power to issue bonds, and the power to expropriate property. Title to all property and improvements vest in the state of Louisiana.

Louisiana courts have repeatedly held that the Greater Baton Rouge Port Commission is an executive department of the state of Louisiana. *Miller v. Greater Baton Rouge Port Commission*, 225 La. 1095, 74 So.2d 387 (1954) ("The Port Commission is not a corporation but an Executive Department of the State." *Id.* at 390. "The Port Commission is an Executive Department of the State and the term notes or bonds issued by it are the primary obligations of the State . . . ." Id. at 389); *See also Greater Baton Rouge Port Commission v. Morley*, 232 La. 87, 93 So.2d 912, 915 (1957); *Greater Baton Rouge Port Commission v. Watson*, 224 La. 136, 68 So.2d 901, 902 (1953).

This court has previously held that the Port Commission is the alter ego of the state and that the Eleventh Amendment bars suits against it in federal court. *Missouri Pacific Co. v. Travelers Insurance Co.*, 281 F.Supp. 100 (E.D. La. [Baton Rouge Division] 1968).

Jacintoport strongly argues that the Port Commission is an independent agency and is independently funded and that the Eleventh Amendment does not bar this action. Plaintiffs cites many comparable statutory powers of the Greater Baton Rouge Port Commission and the Board of Commissioners of the Port of New Orleans and notes that the latter agency has been held to be an independent legal entity not entitled to claim Eleventh Amendment immunity. *C.H. Leavell & Co. v. Board of Commissioners*, 424 F.2d 764 (5th Cir. 1970).

Plaintiff's arguments, although very persuasive, are not accepted for two reasons: (1) the Louisiana jurisprudence cited above holding that the Greater Baton Rouge Port Commission is an executive department of the state — there is no comparable state decisional law regarding the New Orleans port authority, and (2) the prior holding by this court that the Eleventh Amendment bars suits in federal court against the Port Commission. Accordingly, I must conclude that the state of Louisiana is the actual party in interest in this litigation.

[9] Plaintiff seeks, however, to take advantage of the jurisprudence which holds that suits against state officers, even when the suit is directed to the officer's actions in his official capacity, are not against the state and thus not barred by the amendment. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Plaintiff argues that it should be allowed to join the president of the Port Commission as a defendant against whom the court may grant prospective injunctive relief. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Ex parte Young, supra.*

Addition of the president of the Port Commission would not be proper here. The action complained of is clearly state action, action taken by the Commission as a whole, not simply by one of its members. Thus, we cannot conclude that the president of the Port Commission is a state official whose actions are outside the scope of his statutory authority or pursuant to that authority that his actions are unconstitutional so as to come within the legal fiction that sidesteps the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *see also Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982).

It is regrettable that the Port Commission did not plead Eleventh Amendment immunity when this case first began, which would have saved much court, lawyer, witness and client time. It is especially regrettable because the evidence received

in this c urt clearly establishes that the Port Commission's construction work has severely limited access to Jacintoport's property and has caused a reduction in market value for which plaintiff ought to be entitled to a substantial award. Unfortunately the Eleventh Amendment bars this action, and under dictates of Fed.R.Civ.P. 12(h)(3), the court must dismiss the action even though the jurisdictional defect was not discovered until after the trial on the merits. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978).

Accordingly, plaintiff's motion to join an additional defendant is hereby DENIED, and this action will be dismissed for lack of subject matter jurisdiction.

APPENDIX B

JACINTOPORT CORPORATION,
Plaintiff-Appellant
v.
GREATER BATON ROUGE PORT COMMISSION,
Defendant-Appellee.

No. 84-3365.

United States Court of Appeals,
Fifth Circuit

June 10, 1985.

Corporate landowner brought action against port commission alleging that access to corporate property had been impaired and seeking injunctive relief or money damages. The United States District Court for the Middle District of Louisiana, John V. Parker, Chief Judge, 599 F.Supp. 21, ruled that commission was entitled to Eleventh Amendment immunity from suit, and landowner appealed. The Court of Appeals, Wisdom, Circuit Judge, held that commission did not enjoy immunity under Eleventh Amendment.

Reversed and remanded.

1. Federal Courts ⇐ 268

Port commission did not merit Eleventh Amendment immunity where commission's members enjoyed considerable autonomy in exercise of their powers, commission's activities were undertaken only for single port, its bonds had only ancillary effect on state, commission generated its own revenues and any judgment against commission in case at bar would have no effect on state treasury; disapproving *Missouri Pacific Railroad v. Travelers Ins. Co.*, 281 F.Supp. 100. U.S.C.A. Const. Amend. 11.

2. Federal Courts ⇐ 270

Although local government entities may be held to be arm of state and thereby enjoy state's Eleventh Amendment immunity, independent local political subdivisions are not entitled to such immunity even though they exercise "slice of state power." U.S.C.A. Const.Amend. 11.

3. Federal Courts ⇐ 265

In determining immunity under Eleventh Amendment, factor that subsumes all others is treatment of entity in state courts. U.S.C.A. Const.Amend. 11.

4. Federal Courts ⇐ 265

State's guarantee of entity's bonds is only part of inquiry relative to whether entity has Eleventh Amendment immunity. U.S.C.A. Const.Amend. 11.

5. Federal Courts ⇐ 265

To shield states' treasuries is one of most important goals of Eleventh Amendment immunity. U.S.C.A. Const.Amend. 11.

6. States ⇐ 191(2)

When act is in essence one for recovery of money from state, state is real, substantial party in interest and is entitled to invoke its sovereign immunity from suit. U.S.C.A. Const.Amend. 11.

7. Federal Courts ⇐ 265

Purpose of Eleventh Amendment immunity largely disappears when judgement against entity at issue does not entail judgment against state. U.S.C.A. Const.Amend. 11.

8. Federal Courts ⇐ 265

Most important factor in assessing entity's eligibility under Eleventh Amendment is whether funds to defray any award would be derived from state treasury. U.S.C.A. Const.Amend. 11.

9. Federal Courts ⇐ 269

In Fifth Circuit, determination of agency's autonomy for

Eleventh Amendment immunity purposes requires analysis of extent of entity's independent management authority, not just independence of individual commissioners. U.S.C.A. Const.Amend. 11.

10. Federal Courts ⇐ 265

In determining whether entity has Eleventh Amendment immunity, local autonomy is but one factor. U.S.C.A. Const. Amend. 11.

11. Federal Courts ⇐ 265

Although financial independence and local autonomy are more important determinants of entity's Eleventh Amendment immunity, Fifth Circuit uses multifactored test to assess entity. U.S.C.A. Const.Amend. 11.

12. Federal Courts ⇐ 269

In determining entity's Eleventh Amendment immunity, Fifth Circuit would consider whether agency had express authority to sue and be sued in its corporate name, whether agency had been granted right to hold and use property and whether agency was primarily concerned with local, as opposed to statewide, problems, in addition to more important determinants of financial independence and local autonomy. U.S.C.A. Const.Amend. 11.

Appeal from the United States District Court for the Middle District of Louisiana.

Before WIDSOM, REAVLEY, and RANDALL, Circuit Judges.

WISDOM, Circuit Judge:

[1, 2] This appeal presents the question whether the Greater Baton Rouge Port Commission is entitled to immunity from suit in federal court by virtue of the Eleventh Amendment. The district court, 599 F.Supp. 21, ruled that the Commission is entitled to immunity from suit. The court felt bound

by *Miller v. Greater Baton Rouge Port Commission*, 1954, 225 La. 1905, 74 So.2d 387, and by *Pacific Railroad v. Travelers Ins. Co.*, E.D.La. 1968, 281 F.Supp. 100, which described the Commission as an executive department of the State of Louisiana and therefore an alter ego of the state. We hold that neither decision controls the precise question before us. We further hold that under the tests of this Court and other courts, especially the Courts of Appeals of the Third and Sixth Circuits, the Commission does not merit Eleventh Amendment immunity. Although the Commission's members serve at the pleasure of the governor, they enjoy considerable autonomy in the exercise of their powers. The Commission's activities are undertaken only for the Greater Baton Rouge Port, its bonds have only an ancillary effect on the state, and the Commission generates its own revenues. Finally, any judgment against the Commission by Jacintoport will, on the record before us, have no effect on the state treasury. We reverse the trial court.

I. STATEMENT OF THE CASE

The Jacintoport Corporation brought this action against the Greater Baton Rouge Port Commission alleging that the Commission had constructed adjacent to Jacintoport's property two buoys in the bed of the Mississippi River that now impair access to its property from the river. These buoys are used to help in the mooring of vessels for loading and unloading at the public wharf operated by the Commission and leased to Apex Petroleum Fuel and Terminal Oil Company, located immediately down river from the plaintiff's property. Jacintoport prayed for injunctive relief and alternatively for money damages.

The case was tried on the merits without a jury and submitted for decision. After the trial, the district court noted a written stipulation earlier admitted in the proceedings that "the commission is an agency, political subdivision or alter ego of the state of Louisiana" and on February 10, 1984, requested that counsel for both sides brief the issue whether this action is

barred by the Eleventh Amendment. On May 4, 1984, the district court found that the Commission was immune from suit in federal court and dismissed the action. This appeal followed.

II. DISCUSSION

There is considerable uniformity in the circuits in their determination of whether an entity may enjoy immunity under the Eleventh Amendment.[1] Because the question of diversity jurisdiction in a suit against an "agency" of the state frequently parallels this Eleventh Amendment inquiry, we can draw upon this jurisprudence.[2]

We take as the starting point for determining the immunity of the Commission the Supreme Court's discussion in *Lake*

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1. The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Hans v. Louisiana*, 1889, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842, extended the reach of the amendment to cases brought against the state by citizens of that state. The parties raise none of the conceptual issues discussed in *Pennhurst State School and Hospital v. Halderman*, 1984, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67. The narrow issue this case presents is the applicability of the doctrine of sovereign immunity to the particular port commission serving Baton Rouge.

2. Chief Judge Seitz discussed the relationship between immunity under the Eleventh Amendment and diversity jurisdiction in his concurring opinion in *Ramada Inns, Inc. v. Rosemount Memorial Park Ass'n*, 3 Cir. 1979, 598 F.2d 1303, 1309:

> "It is surprising, however, given the divergent principles underlying the two inquiries, that the only distinction between them to have received judicial recognition to date is that the state may waive its eleventh amendment sovereign immunity but is unable to waive the lack of subject matter jurisdiction if diversity does not exist in a given suit."

Because the waiver of Eleventh Amendment immunity is not at issue in this case, the determination of Eleventh Amendment immunity and citizenship for purposes of diversity jurisdiction is the same. *See infra* note 3.

Country Estates v. Tahoe Regional Planning Agency, 1979, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401. There, the Supreme Court denied Eleventh Amendment immunity to a bi-state planning agency created by California and Nevada and sanctioned by Congress:

> "By its terms, the protection afforded by that Amendment is only available to 'one of the United States.' It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, *even though such entities exercise a 'slice of state power.'* "

440 U.S. at 400-01, 99 S.Ct. at 1177, 59 L.Ed.2d at 410 (emphasis added).

Although sometimes local governmental entities may be held to be an arm of the state and thereby enjoy the state's Eleventh Amendment immunity, *Sessions v. Rusk State Hospital*, 5 Cir. 1981, 648 F.2d 1066, 1069, independent local political subdivisions are not entitled to that immunity even though they exercise a "slice of state power." This Circuit has outlined the general inquiry as follows: "A federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself." *Laje v. R.E. Thomason General Hospital*, 5 Cir. 1982, 665 F.2d 724. If the state is a "necessary party," then the suit is typically barred by the Eleventh Amendment.

A. The District Court's Holding

This district court first stated that "Louisiana courts have repeatedly held that the Greater Baton Rouge Port Commis-

sion is an executive department of the state of Louisiana," citing *Miller v. Greater Baton Rouge Port Commission*, 1954, 225 La. 1095, 74 So.2d 387, 389, 390.[3] The district court next relied on an earlier district court opinion holding that the Port Commission is the "alter ego of the State of Louisiana." *Missouri Pacific Railroad v. Travelers Ins. Co.*, E.D.La. 1968, 281 F.Supp. 100, 103. Finally, although the district court acknowledged the many comparable statutory powers of the Commission and the Board of Commissioners of the Port of New Orleans (held to be an independent legal entity not entitled to immunity in *C.H. Leavell & Co. v. Board of Commissioners*, 5 Cir. 1970, 424 F.2d 764), the court felt compelled to give the Commission immunity because of Louisiana jurisprudence and the district court opinion in *Missouri Pacific*.

Upon review, we find that the cases relied upon by the district court are not dispositive of the issue. The Louisiana cases cited by the district court both in the instant case and in the *Missouri Pacific* opinion did not deal with the precise question before us, nor was their inquiry based on even analogous jurisprudential concerns guiding a determination of immunity under the Eleventh Amendment. Our examination of the Commission under the standards established by this Court and by other Circuits convinces us that, although the question is a close one, the Commission does not enjoy Louisiana's Eleventh Amendment immunity. We accordingly disaffirm *Missouri Pacific* to the extent it conflicts with the holding in this opinion.

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3. *Miller* held that the Commission "is not a corporation but an Executive Department of the State." 74 So.2d at 390. "The Port Commission is an Executive Department of the State and the term notes or bonds issued by it are the primary obligations of the State . . . ." *Id.* at 389. The district court's opinion also referred to *Greater Baton Rouge Port Comm'n v. Morley*, 1957, 232 La. 87, 93 So.2d 912, 915, and *Greater Baton Rouge Port Comm'n v. Watson*, 1953, 224 La. 136, 68 So.2d 901.

B. Treatment of the Baton Rouge Commission by Earlier Courts

[3] Our Circuit has held that, in determining immunity under the Eleventh Amendment, a factor that "subsumes all others" is the treatment of the entity in state courts. *Huber, Hunt & Nichols v. Architectural Stone Co.*, 5 Cir. 1980, 625 F.2d 22, 25. The overarching importance of this factor was reiterated in the analogous inquiry of citizenship for diversity jurisdiction. *Tradigrain, Inc. v. Mississippi State Port Authority*, 5 Cir. 1983, 701 F.2d 1131, 1132. Federal courts attempt thereby to ascertain whether the entity is "separate and distinct" or whether the action is "in effect, a suit against the State" barred by the Eleventh Amendment. *Louisiana Land & Exploration Co. v. State Mineral Board*, 5 Cir. 1956, 229 F.2d 5, 7.

Similarly, the Third and Sixth Circuits have held that although the question of Eleventh Amendment immunity is a matter of federal law, state decisions concerning the relationship of the entity to the state may be "an important, and under certain circumstances a controlling factor" in determining immunity under the Eleventh Amendment. *Blake v. Kline*, 3 Cir. 1979, 612 F.2d 718, 722, *cert. denied*, 1980, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1112; *see also Hall v. Medical College*, 6 Cir. 1984, 742 F.2d 299, 302, quoting *Blake* with approval.

In *Miller v. Greater Baton Rouge Port Commission*, 1954, 225 La. 1095, 74 So.2d 387, taxpayers sought to enjoin the Commission from issuing term notes or bonds, whether the issuance was pursuant to a resolution adopted by the Commission or was under the Louisiana constitutional amendment establishing the Port Commission. The relevant issue in that case was whether Act 9 of 1952, which empowered the Commission to issue bonds guaranteed by the state, had the improper effect of providing "the loan of credit of the State to a corporation." *Id.*, 74 So. 2d at 389. The court found the guarantee was

proper: "The Port Commission is not a corporation but an executive department of the state." *Id.* at 390.

This single sentence pertaining to bond underwriting does not dispose of the question of the Commission's Eleventh Amendment immunity. Although *Miller* holds that the Commission is an "agent" of the state insofar as the state ultimately guarantees the Commission's bonds, the case is devoid of any language expressing or implying that this agency status is sufficiently broad based to make the Commission an "alter ego" of the state.

This Court impliedly rejected a similar argument for the Board of Commissioners of the Port of New Orleans in *C.H. Leavell & Co. v. Board of Commissioners*, 5 Cir. 1970, 424 F.2d 764. Although the state guaranteed the New Orleans Commission's bonds, *id.* at 766, which would cast the Commission as an "agency" of the state under *Miller*, we found that the New Orleans Commission was a sufficiently separate entity from the state to sustain diversity jurisdiction, *id.* at 767. We found "no controlling State precedent" on whether the New Orleans Commission (the "Dock Board") was the alter ego of the State of Louisiana: "The resolution of this issue requires an *Erie* supposition as to Louisiana law, since no definitive precedent can be found. We hold the Dock Board, as a State agency, has a separate legal identity from the State of Louisiana and affirm the decision of the District Court." *Id.* at 765. Because the analysis of an agency's status is virtually identical for determining immunity under the Eleventh Amendment and citizenship for diversity jurisdiction,[4] our holding was the equivalent of a

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4. This Court has repeatedly held that "the analysis of an agency's status is virtually identical whether the case involves a determination of immunity under the eleventh amendment or a determination of citizenship for diversity jurisdiction." *Tradigrain v. Mississippi State Port Authority*, 5 Cir. 1983, 701 F.2d 1131, 1132; *see Laje v. R.E. Thomason General Hospital*, 5 Cir. 1982, 665 F.2d 724, 726 n. 2.

finding that the Dock Board had no Eleventh Amendment immunity. We therefore decline to afford the Commission in this case immunity under the Eleventh Amendment when it has simply been described, without more, as an "agency" of the State.

[4] Even without *Leavell*, we would decline to predicate a broad immunity on the basis of the narrow holding of *Miller*. This Circuit's test for Eleventh Amendment immunity examines many factors; the state's guarantee of the entity's bonds is only a part of that inquiry. It would be inconsistent with this Circuit's test for determining immunity to rely on *Miller*, because immunity of the Port Commission was never an issue in that case, and the analysis examined only a part of the many factors we must weigh here in determining the Commission's immunity. Accordingly, we are not bound by *Miller* in our determination of the Commission's Eleventh Amendment status.

In *Missouri Pacific Railroad v. Travelers Insurance Co.*, E.D.La. 1968, 281 F.Supp. 100, the district court held that the Commission was the alter ego of the State of Louisiana rather than a citizen of the state for purposes of establishing diversity jurisdiction. The court ruled:

> "The provisions of the constitutional amendment and the legislative act creating the Port Commission clearly support the holding of the Louisiana Supreme Court that the Commission is, in fact, an executive department of the State of Louisiana and thus the alter ego of the State, and thus it is not a 'citizen' of the State such as to invoke the diversity jurisdiction of this Court."

Id. at 103.

Although we recognize that the inquiry into an agency's citizenship for diversity jurisdiction and into its status for governmental immunity under the Eleventh Amendment are virtually the same, *see* note 3, we nevertheless decline to follow *Missouri Pacific* in determining whether the Eleventh Amend-

ment bars suit against the Commission in federal court. We do not consider this case to be controlling for a number of reasons. First, Judge West himself, the author of the *Missouri Pacific* opinion, did not consider that holding to bar a later suit against the Commission by a railroad company seeking injunctive relief. *See Louisiana & Arkansas Railway v. Missouri Pacific Railroad*, E.D.La. 1968, 288 F.Supp. 320, *aff'd*, 5 Cir. 1969, 415 F.2d 751, *cert. denied*, 1970, 396 U.S. 1060, 90 S.Ct. 757, 24 L.Ed.2d 754.[5] More importantly, a de novo analysis of the Baton Rouge Commission under the test for Eleventh Amendment immunity enunciated by this Circuit in *Laje v. R.E. Thomason General Hospital*, 5 Cir. 1982, 665 F.2d 724, and *Tradigrain, Inc. v. Mississippi State Port Authority*, 5 Cir. 1983, 701 F.2d 1131, convinces us that the Commission should not have governmental immunity. To the same effect, see *Hall v. Medical College*, 6 Cir. 1984, 742 F.2d 299, and *Blake v. Kline*, 3 Cir. 1979, 612 F.2d 718, *cert. denied*, 1980, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1112. We therefore hold that the Baton Rouge Port Commission is subject to suit in federal court, and disaffirm *Missouri Pacific* to the extent it conflicts with our holding today.

C. The Important Factor of Financial Independence

[5-7] One of the most important goals of the immunity of the Eleventh Amendment is to shield states' treasuries. *See Edelman v. Jordan*, 1974, 415 U.S. 651, 663, 97 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662, 672-73. The concern in the inquiry into the entity's financial autonomy is whether the judgment will be satisfied by the entity's funds or by state appropriations. As the Supreme Court stated, "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its

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5. In this later opinion, Judge West again described the Commission as "an executive department of the State of Louisiana." *Id.* at 321.

sovereign immunity from suit." *Ford Motor Company v. Department of Treasury*, 1945, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389, 394. The purpose of the immunity therefore largely disappears when a judgment against the entity does not entail a judgment against the state.

[8] Following the implications of this jurisprudence, both the Third and Sixth Circuits have adopted specific inquiries in assessing an entity's financial autonomy. In those circuits, the courts of appeals consider the most important aspect of financial independence to be whether, on the record before the Court, a judgment for the plaintiff would be satisfied from the entity's own funds or from the state treasury. *See Hall*, 742 F.2d at 304; *Blake*, 612 F.2d at 723-24, 726. Our Court has similarly held that the most important factor in assessing an entity's eligibility under the Eleventh Amendment is "whether the funds to defray any award would be derived from the state treasury." *Laje v. R.E. Thomason General Hospital*, 5 Cir. 1982, 665 F.2d 724, 727.

On the record before us, it appears that any judgment obtained by Jacintoport can be satisfied by the Commission itself. The trial court considered the issue of damages ripe for resolution, but declined to address the matter because of concerns over Eleventh Amendment immunity. On appeal, we have the benefit of the trial court's record. That record shows that even the most favorable estimation of Jacintoport's monetary damages does not reach a tenth of the Commission's surplus revenue in a "good year" — of which it has had several recently. The State of Louisiana will not incur liability on this judgment's account. We specifically decline to reach the question of this Commission's immunity in an instance where the size and nature of the judgment sought would clearly result in liability for the state.

The inquiry into other aspects of financial autonomy is more ill-defined. The common factor is the extent of the state's liability for the entity's general debts and obligations (as

opposed to liability for a judgment). For example, where the state's only liability was in guaranteeing a state authority's notes and bonds, courts have found that this "ancillary effect" on the state treasury does not confer immunity under the Eleventh Amendment. *Blake*, 612 F.2d at726; *Morrison-Knudsen Co. v. Massachusetts Bay Transp.*, D.Idaho 1983, 573 F.Supp. 698, 701-02. Where the State of Ohio annually funded the difference between a medical college's revenues and expenses, however, the Sixth Circuit held that "any distinction between MCO's appropriated and self-generated revenues in the context of Eleventh Amendment immunity would be a pure exercise in elevating form over substance." *Hall*, 742 F.2d at 305; *cf. Tradigrain v. Mississippi State Port Authority*, 5 Cir. 1983, 701 F.2d 1131, finding that the state's status as *primary* guarantor of the Port Authority's bonds was an indicium that the Authority was the alter ego of the State of Mississippi. In this circuit, we have found probative the fact that a hospital district was financed through levies that were separate from other county or state taxes and through bonds sold upon the full faith and credit of the district. *Laje*, 665 F.2d at 727. The Court found "most telling" in *Laje* that the Texas Constitution provided that a hospital district "shall never become a charge against the State of Texas." *Id.*

Judged by these tests, the Commission is not sufficiently connected to the State to be accorded immunity under the Eleventh Amendment. The deposition of Mr. C.W. Hebert, executive director of the Commission since May 1959, shows that the Port Commission is completely self-supporting; all construction, maintenance, and purchases mentioned in the deposition have been funded by tariffs that the Commission assesses on traffic through the Port. The Commission is thus readily distinguishable from the medical college in *Hall*, where the deficit was annually funded by Ohio. The legislature has empowered the Commission, upon approval of the State Bond Commission, "to incur debt for its lawful purposes and to issue *in its name* negotiable bonds or notes." La.Rev.Stat.Ann.

34:1224 (West 1984) (emphasis added). In the first instance, the bonds constitute a general obligation of the Commission. Should the Commission default, the bonds are next obligations subject to the full faith and credit of the Parish of East Baton Rouge, the Parish of West Baton Rouge, and the Parish of Iberville. Finally, should these parishes default, the bonds are subject to the full faith and credit of the State of Louisiana. We find that this tertiary liability has only an ancillary effect on the State treasury and thus discourages us from confering immunity.

D. The Autonomy of the Commission

A second factor of great significance, although less important than financial independence, is the entity's degree of local autonomy. *See Laje*, 665 F.2d at727, stating, "Courts typically look at the degree of local autonomy and control, and most importantly whether the funds to defray any award would be derived from the state treasury." Local autonomy is not only a measure of the closeness of the connections between the entity and the State, it is also the mechanism through which the Eleventh Amendment "assure[s] that the federal courts do not interfere with a state's public policy and its administration of internal public affairs." *Blake*, 612 F.2d at 725; *cf. Hall*, 742 F.2d at 306, discussing control by the state of the state colleges' educational programs through appointments and statutory provisions governing the organization and functioning of the colleges.

The Commission has argued that is not autonomous, pointing out that the Baton Rouge Commissioners serve at the pleasure of the governor, La.Rev.Stat.Ann. 34:1221 (West Supp. 1984), which may show a lack of autonomy. *Cf. Gibson-Homans Co. v. New Jersey Transit Corp.*, D.N.J. 1982, 560 F.Supp. 110, 113, finding that a corporation was "not autonomous from the Executive Branch as a whole given the Governor's power to appoint all of the members of the governing

board, to remove them for cause and to veto any decision made by the board."

[9] It is true that the vulnerability of the commissioners to the governor's pleasure militates against a finding of local autonomy. In our circuit, however, the determination of an agency's autonomy requires analysis of the "extent of the [entity's] independent management authority," *Huber*, 625 F.2d at 25, not just the independence of the individual commissioners. Here, the record discloses that the Commission has great latitude to enter into contracts to negotiate sales and to formulate and execute policy without additional approval.

[10, 11] Local autonomy, of course, is but one factor in the many this Court must weigh, and it has not always been dispositive. *See Tradigrain*, 701 F.2d at 1133, where the Court found the Mississippi Port Authority to be an "alter ego" of the state despite the Authority's "wide latitude and discretion" in the exercise of its duties. Although financial independence and local autonomy are the more important determinants of an entity's Eleventh Amendment immunity, this Circuit, like the Third and the Sixth, uses a multifactored test to assess the entity. We now turn to the remaining factors.

E. Other Factors in this Circuit

[12] Under *Tradigrain v. Mississippi State Port Authority*, 5 Cir. 1983, 701 F.2d 1131, this Court must consider the following additional factors:

(1) whether the agency has express authority to sue and be sued in its corporate name;

(2) whether the agency has been granted the right to hold and use property; and

(3) whether the agency is primarily concerned with local, as opposed to state-wide, problems.

See id. at 1132; *Kurkiewicz v. State*, M.D. La. 1983, 560 F.Supp. 911, 913.

As noted by this Court in *Tradigrain*, in a typical situation, some of these factors will point to immunity, while others will just as strongly suggest that the entity is an independent political subdivision. The Court "must never, however, lose sight of the primary question involved: whether the state is the real party in interest in the lawsuit nominally brought against the agency." 701 F.2d at 1133.

The factor enumerated first, the entity's right to sue and be sued, weighs against immunity. Although the Louisiana legislature did not expressly authorize the Commission to sue and be sued in its own name,[6] the Commission has twice maintained actions in its own behalf and not through the State of Louisiana,[7] and has twice appeared in federal court as a general party.[8] Although the Commission has the right to use the legal services of the Louisiana Attorney General's Office, it can also employ private attorneys to represent it. La.Stat.Rev. Ann. 34:1223(B) (West 1984). We, therefore, believe that this factor also weighs against immunity.

In the case of the Baton Rouge Commission, by statute, "[t]itle to all property and improvements thereon operated by the Commission shall vest in the State of Louisiana." La.Rev. Stat.Ann. 34:1223(C) (West 1964). In the New Orleans Port Authority, by contrast, title to the property it administers vests in the Authority rather than the state. *Leavell*, 424 F.2d

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6. The New Orleans Port Authority, which this Court held to be an independent political subdivision of the state, was never expressly legislatively empowered to sue or be sued in its own name. *See George A. Fuller Co. v. Coastal Plains, Inc.*, E.D.La.1968, 290 F.Supp. 911, 913-14.

7. *See, e.g., Greater Baton Rouge Port Comm'n v. Cargill, Inc.*, 1968, 252 La. 718, 214 So.2d 119; *Greater Baton Rouge Port Comm'n v. Morley*, 1952, 232 La. 87, 93 So.2d 912.

8. *Louisiana & Arkansas Ry. v. Missouri Pacific R.R.*, E.D.La.1968, 288 F.Supp. 320, *aff'd*, 5 Cir. 1969, 415 F.2d 751, *cert. denied*, 1970, 396 U.S. 1060, 90 S.Ct. 757, 24 L.Ed.2d 754; *Ohio River Co. v. M/V Irene Chotin*, E.D.La.1965, 238 F.Supp. 114.

at 765. We therefore find that this second factor weighs in favor of immunity.

Finally, we turn to the question whether the Commission is concerned primarily with local rather than state-wide development. The statutory mandate is ambiguous: The Commission is to "regulate the commerce and traffic *within such port area* in such manner as may, in its judgment, be *for the best interest of the state.*" La.Rev.Stat.Ann. 34:1223(B) (West 1964) (emphasis added).

Fortunately, there is guidance from other circuits. Our local/state test is similar to the Third and Sixth Circuits' "governmental" or "proprietary" test. *Hall v. Medical College*, 6 Cir. 1984, 742 F.2d 299, 305; *Blake v. Kline*, 3 Cir. 1979, 612 F.2d 718, 724, *cert. denied*, 1980, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1112; *Morrison-Knudsen v. Mass. Bay Transp.*, D.Idaho 1983, 573 F.Supp. 698, 703; *DeLong Corp. v. Oregon State Highway Comm'n.*, D.Or. 1964, 233 F.Supp. 7, 15, *aff'd.*, 9 Cir., 343 F.2d 911, *cert. denied*, 1965, 382 U.S. 877, 86 S.Ct. 161, 15 L.Ed.2d 119. An authority on municipal corporations has suggested the following test to determine whether a particular agency's activity constitutes a "governmental" or "proprietary" function:

> "Although it has been said that the character and nature of municipal corporations remain at all times the same, [footnote omitted] *in their public or governmental capacity they act as the agent of the state for the benefit and welfare of the state as a whole, but when acting for the peculiar and special advantage of their inhabitants, rather than for the good of the state at large, they act in a private or proprietary capacity.*"

Morrison-Knudsen Co. v. Massachusetts Bay Transp., D.Idaho 1983, 573 F.Supp. 698, 703 (quoting 1 McQuillan, Municipal Corporations § 1.09 (1971)) (emphasis added by the district court). Because the object of the Authority's concern is local under the standards set forth by McQuillan, and because it acts

for the special advantage of the Baton Rouge Port, it follows that the Commission is performing a proprietary, or local, rather than a governmental, or statewide, function. The third factor therefore weighs against immunity.

III. CONCLUSION[9]

The question presented by this appeal is a close one. A weighing of all the relevant factors, however, tips the balance away from immunity. We find of great importance the two particular findings that a judgment against the Commission in this case will not affect the state treasury and that the policies and practices of the state will not be significantly affected. We therefore REVERSE the dismissal for want of jurisdiction and REMAND for further proceedings.

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9. Jacintoport has argued that because of the substantial similarities between the New Orleans Port Commission and the Baton Rouge Commission, this Court should accord them similar treatment and decline to grant immunity to the Baton Rouge Commission. *See C.H. Leavell & Co. v. Board of Commissioners*, 5 Cir.1970, 424 F.2d 764, holding that the New Orleans Port Commission was an independent legal entity from the state and was amendable to subject matter jurisdiction. Although the Commission has called our attention to differences between the two entities, we believe that the similarities outweigh the differences, and this conclusion bolsters our holding reached under the multi-factor test of *Tradigrain*, *Hall* and *Blake*.

The Baton Rouge Port Commission and the New Orleans Port Commission were created under different statutory provisions, but the following similarities emerge:

(1) Both Commissions are selected from names submitted to the governor by local authorities. *Compare* La.Rev.Stat.Ann. 34:1 *with id.* 34:1221.

(2) Both Commissions have the independent authority to make decisions regarding compensation as well as the power to contract for legal, financial, and engineering services. *Compare id.* 34:4 *with id.* 34:1223.

(3) The general rights and powers of the Commissions are analogous. *Compare id.* 34:21 *with id.* 34:1223.

(4) Both Commissions are vested with the authority to expropriate. *Compare id.* 34:23 *with id.* 34:1226.

(5) Both Commissions have similar authority to borrow money and issue bonds. *Compare id.* 34:29 *with id.* 34:1224.

The defendents point out that the Baton Rouge Commissioners are appointed by the governor and serve at the governor's pleasure, unlike the Commissioners of the New Orleans Port Commission. *Compare id.* 34:1221 *with id.* 34.1. It is true that this structure ties the Baton Rouge Commission more closely to the state. The defendents also point out that the Baton Rouge Commission must take its actions for "the best interest of the state," while the New Orleans Port Commission has no such mandate. We have discussed these factors at greater length in the text of the opinion in the context of *Tradigrain's* multi-factored test. With respect to statutory similarities and differences, we do not consider these differences to be of sufficient importance to warrant the conclusion that the statutory framework of the New Orleans and Baton Rouge Commissions are more different than alike.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3365.

JACINTOPORT CORPORATION,
Plaintiff-Appellant,
v.
GREATER BATON ROUGE PORT COMMISSION,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Louisiana

ON PETITION FOR REHEARING
JULY 29, 1985

Before WISDOM, REAVLEY and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT: